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No. 91-1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONSOL PENNSYLVANIA COAL COMPANY, et al.,

Petitioners,

vs.

JAMES E. HUGHES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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Respondents' brief in opposition ("Br. Opp.") to the petition for a writ of certiorari ("Pet.") is profoundly mistaken in asserting that petitioners waived the due process issue because "[i]n the first trial no such issue was raised before the Honorable Hubert I. Teitelbaum". (Br. Opp. at 8). They misread *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257 (1989), and the record before the District Court.

First, the actual holding on the waiver point in *Browning-Ferris* was that, because the petitioner there "failed to raise their due process argument before *either* the District Court *or* the Court of Appeals, and made no specific mention of it in their

petition for certiorari in this Court, we shall not consider its effect on this award." *Id.* at 277 (emphasis supplied). The Court has repeatedly stated the test in this alternative form. *See Air Courier Conf. of America v. American Postal Workers Union, AFL-CIO*, 111 S.Ct. 913, 917 (1991) (Rehnquist, Ch.J.) (because issue "was not argued to *either* of the lower courts, and was not considered by *either* court below in deciding this case", issue waived) (emphasis supplied); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 34 (1977) (issue not presented *either* in district court *or* court of appeals not considered); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976) (same).

Respondents do not contend (as they could not) that the due process issue was not raised in the Court of Appeals or in the District Court by proper motion after the second trial. It was raised in both courts, and the District Court (before *Haslip*, *infra*) considered and rejected petitioners' contention.* (That the issue is presented by the petition is, of course, clear.) The due process issue is consequently preserved.

Moreover, as explained in *Browning-Ferris*, at the time of that decision the Court had "never addressed the question" whether due process acts as a check on undue jury discretion to award punitive damages. 492 U.S. at 277. That issue was not resolved until the Court decided *Haslip* on March 4, 1991, *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, long after the first trial in 1987. As Justice Harlan said about the failure of a defendant to assert a constitutional defense to a libel action first announced by this Court after the trial, "the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground". *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-43 (1967) (plurality opinion) (collecting numerous cases). More recently, a change in controlling law in a Supreme Court decision six months after the filing of the petition was held to justify

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* In the Court of Appeals, *see Brief of Defendants-Appellees* at 63-67, *Hughes v. Consol Pennsylvania Coal Co.*, No. 90-3466 (3d Cir. Dec. 20, 1991); in the District Court, *see* Pet. at 8, n.8, and *Loughman v. Consol-Pennsylvania Coal Co.*, 740 F.Supp. 1114, 1123-24 (W.D. Pa. 1990) (Smith, D.J.) (A-85-87).

an argument not raised below or in the petition. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 n.7 (1984). Again, it has been said on the authority of many cases that "we have frequently allowed parties to raise issues for the first time on appeal when there has been a significant change in the law since the trial." *Standard Industries, Inc. v. Tigrett*, 397 U.S. 586, 587 (1970) (Black, J., dissenting).

Nor has the Court hesitated to grant review of an issue despite the petitioner's failure to raise it below when the issue is "in a state of evolving definition and uncertainty [citations] and one of importance to the administration of federal law." *Virginia Bankshares Inc. v. Sandberg*, 111 S.Ct. 2749, 2761 n.8 (1991), quoting *St. Louis v. Praprotnick*, 485 U.S. 112, 120-21 (1988) (plurality opinion). The questions presented by the petition involve precisely such evolving and important issues.

Second, at the trial before Judge Teitelbaum (the first trial), the due process issue *was* raised in general terms. Petitioners' memorandum of law dated April 10, 1987, in support of their motion for judgment n.o.v. and a new trial ("Mem.") argued, in the alternative, that the award of punitive damages was unsupported and, as to the vagueness of instructions to the jury, as follows (*Mem.* at 63):

> Finally, the result in these cases raises a serious question under the Fifth Amendment, for "due process guarantees a *comprehending* factfinder." *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1084 n. 14 (3d Cir. 1980) (emphasis supplied). When a jury is unable to perform its task "with a reasonable understanding of the evidence and the legal rules, due process is denied." *Id.* at 1084 (barring jury trial in complex antitrust action). (emphasis supplied).

The contention was directed to the "result" in these cases, i.e., to the first jury's award of compensatory and punitive damages, and thereby encompassed the due process issue. It was unnecessary for Judge Teitelbaum to pass on the contention, for

he set aside the first jury's compensatory award (and therefore the punitive award) on the non-constitutional ground that it was "obscenely excessive". (A-98 and A-113). It is not surprising, therefore, that the judge presiding at the second trial (D. Brooks Smith, D.J.) could not "recollect" that petitioners had raised this objection, (Br. Op. at 8; Pet. at A-85), but went on to decide the issue nevertheless. *Loughman*, 740 F.Supp. at 1123-24 (A-85-87).

Other contentions of respondents' brief in opposition are sufficiently answered in the petition.

Respectfully submitted,

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